PennState Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 83
Issue 1 *Dickinson Law Review - Volume 83, 1978-1979*

10-1-1978

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Recommended Citation

William R. Slomanson, *Real Property Unrelated to the Claim: Due Process For Quasi In Rem Jurisdiction?*, 83 DICK. L. REV. 51 (1978).
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Real Property Unrelated to Claim: Due Process for Quasi in Rem Jurisdiction?

William R. Slomanson*

I. Introduction

Since *Shaffer v. Heitner,*[1] the physical power test of quasi in rem jurisdiction, derived from *Pennoyer v. Neff*[2] and its progeny, has been supplanted by the "elastic standard"[3] of the minimum contacts test announced by the Supreme Court in *International Shoe Co. v. Washington.*[4] Portions of the *Shaffer* opinion unfurled the dormant but undecided[5] issue whether due process permits quasi in rem jurisdiction by attachment of defendant's *real* property *not* related to plaintiff's claim. This article concludes that despite arguments to the contrary, due process must be interpreted to preclude quasi in rem jurisdiction over real property unrelated to the plaintiff's lawsuit.[6] A different interpretation would clandestinely retain the power theory

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1. 433 U.S. 186 (1977).

2. 95 U.S. 714 (1877) (states possess exclusive jurisdiction over persons and property within their borders).

3. Commenting adversely upon the announcement of the "minimum contacts" test of in personam jurisdiction, Justice Black reasoned that "[n]o one, not even those who most feared a democratic government, ever formally proposed that courts should be given the power to invalidate legislation [via fourteenth amendment due process clause] under any such elastic standards." International Shoe Co. v. Washington, 326 U.S. 310, 325 (1945) (Black, J., dissenting).

4. 326 U.S. 310, 316 (1945).

5. *Shaffer* dictates that the minimum contacts test normally applicable to in personam jurisdiction, applies to *all* state court assertions of jurisdiction, including quasi in rem jurisdiction over intangibles with a statutory situs in the forum. Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The Court reserved the issue whether mere presence of property suffices when no other forum is available, however. *Id.* at 211 n.37.

6. This article deals with jurisdictional utilization of real property that is not related to the reason for plaintiff's lawsuit. No distinction is made among defendant's "ownership," "possession," "use" or similar possessory interests subject to the myriad of state statutory procedures for prejudgment attachment.

of jurisdiction, a result contrary to the current reasonableness standard enunciated in *Shaffer.*

II. Demise of the Physical Power Test

A. Historical Background of the Power Test.

In ancient Roman practice, foreign attachment proceedings[7] were intended to provide a remedy against absentee defendants.[8] This worthy rationale was observed in both medieval England[9] and its later American colonies.[10] The early American landmark case of *Pennoyer v. Neff*[11] solidified the doctrine that quasi in rem land attachment was an appropriate remedy against nonresidents who failed to satisfy their obligations, including obligations having no nexus with the attached property.[12] The basis for the doctrine was

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7. Foreign attachment is a process issued against a nonresident debtor owning property that has a forum situs. *See, e.g.,* CAL. CODE CIV. PROC. § 483.010 (West 1977); N.Y. CIV. PRAC. LAW & RULES §§ 6214-15 (McKinney 1974). The defendant's nonresidence is both a traditional and uniformly applicable ground for state attachment. *See* M. GREEN, BASIC CIVIL PROCEDURE 37 (1972).

This article concentrates upon foreign attachment because of its amenability to abuse under traditional notions of fairness. A related problem, beyond the scope of this article, concerns the questionable reasonableness of quasi in rem attachment by a nonresident plaintiff of a nonresident defendant's property. See, e.g., Farrell v. Piedmont Aviation, Inc., 411 F.2d 812, 816-17 (2d Cir. 1969), *cert. denied,* 396 U.S. 840 (1969).

8. 1 R. SHINN, TREATISE ON AMERICAN LAW OF ATTACHMENT ANDGARNISHMENT 1 (Indianapolis 1896) [hereinafter cited as R. SHINN]. For reference to attachment in the middle ages, see Mussman & Riesenfeld, *Garnishment and Bankruptcy,* 27 MINN. L. REV. 1 (1942).

9. *See* Locke, *The Law and Practice of Foreign Attachment in the Lord Mayor's Court,* in C. DRAKE, TREATISE ON SUITS BY ATTACHMENT IN THE UNITED STATES (2d ed. 1858).

10. *See* R. SHINN, *supra* note 8, at 2-3.

Actually, there are two types of attachment. Prejudgment security attachment is a means of obtaining security prior to enforcing a judgment. Normally, the attaching court has in personam jurisdiction over the defendant whose property is attached, and therefore, the device is not used to acquire jurisdiction. Silberman, *Shaffer v. Heitner: The End of an Era,* 53 N.Y.U. L. REV. 33, 54 (1978). This type of attachment has recently been scrutinized under the due process clause of the fourteenth amendment. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (Court invalidated Georgia garnishment statute that did not provide the defendant an opportunity to defend against the garnishment); Fuentes v. Shevin, 407 U.S. 67 (1972) (Court invalidated Florida and Pennsylvania replevin statutes, which allowed seizure of defendant's property without notice or opportunity to defend); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (Court held that Wisconsin prejudgment wage garnishment statute, which froze defendant's wages before trial without opportunity to contest the garnishment, violated the fourteenth amendment proscription against taking property without due process).

The second type of attachment is jurisdictional attachment, and it is used by plaintiffs as a last resort to compel a defendant to come into the forum and defend against the suit. Here, the goal is not to enforce a judgment, but to obtain one. Silberman, *supra* note 10, at 59. This is also the type of attachment with which the *Shaffer* Court was, and this article is, concerned. As the Court recognized in *Shaffer,* the Delaware sequestration procedure was employed "to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity." Greyhound Corp. v. Heitner, Letter Op. App. 75-76 (Del. Ch. 1975) as quoted in Shaffer v. Heitner, 433 U.S. 186, 193 (1978).

11. 95 U.S. 714 (1877).

12. The state court judgment reviewed by the *Pennoyer* Court concerned Mitchell's contract claim for attorney's fees ineffectually initiated without prejudgment attachment. The Court noted that "[t]he property here in controversy sold under the judgment rendered was not

the "power" theory of jurisdiction, which was essentially territorial in nature and was premised on two principles of public law—that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"[13] and "that no state can exercise direct jurisdiction and authority over persons or property without its territory."[14] As Justice Holmes succinctly stated, "The foundation of jurisdiction is physical power . . . ."[15] Thus, presence of the defendant or his property in the territory, no matter how transient,[16] became entrenched as the requirement for all assertions of jurisdiction.[17]

Years later, in *International Shoe Co. v. Washington,*[18] the Supreme Court abolished presence of the defendant in the forum as a prerequisite to in personam jurisdiction. Speaking for the Court, Justice Stone said that

> due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[19]

Under this test a state could exercise jurisdiction over a nonresident defendant whenever he had such contacts with the forum state as to make it reasonable to require the defendant to defend the suit there.[20] This reasonableness test was later applied by *International Shoe's* progeny to other bases for in personam jurisdiction[21] such as domicile,[22] residence,[23] consent,[24] doing business,[25] and ownership

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attached, nor in any way brought under the jurisdiction of the court." *Id.* at 720. *See also* Shaffer v. Heitner, 433 U.S. 186, 198 n.16 (1977).

13. Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

14. *Id.*

15. McDonald v. Mabee, 243 U.S. 90, 91 (1917) (defendant subject to in personam jurisdiction when all ties with the forum not broken although defendant in the process of establishing a new domicile).

16. *See, e.g.,* Grace v. MacArthur, 170 F. Supp. 442, 443-44 (E.D. Ark. 1959) (defendant served while passing over state in airplane). This type of jurisdiction has not been without its critics, however. *See, e.g.* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens* 65 YALE L. J. 289, 293 (1956).

17. This standard applied whether jurisdiction was in personam, in rem or quasi in rem.

18. 326 U.S. 310 (1945).

19. *Id.* at 316. The essential procedural due process requirement, announced five years later, is best notice practicable. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

20. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

21. The subsequent revision of the Restatement of Conflicts reflects the contention that mere physical presence, as a basis for jurisdiction, "is inconsistent with the basic principle of reasonableness which underlies the field of judicial jurisdiction." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28, Comment a (1971).

22. *See* McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

23. *Id.*

24. National Equipment Rental Ltd. v. Szukhent, 375 U.S. 311 (1964).

25. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952). Actually, considering corporate or individual ownership of property as "doing business" for purposes of find-

of land within the forum giving rise to the claim sued upon.[26] Despite *International Shoe's* impact on in personam jurisdiction, however, few advances were made in the area of in rem and quasi in rem jurisdiction.[27]

Finally, the *Shaffer* Court significantly altered, if not altogether abolished,[28] quasi in rem jurisdiction by requiring that the standard of fairness and substantial justice used in *International Shoe* to determine the constitutionality of in personam jurisdiction be applied to all assertions of jurisdiction.[29] Thus, mere physical presence of property in the forum state will no longer suffice to support an assertion of quasi in rem jurisdiction if the property is unrelated to the claim. Nevertheless, as Justice Marshall pointed out, applying the reasonableness test to in rem and quasi in rem actions in which claims to the property are the basis of jurisdiction will not effect any major changes.[30] For example, a quiet title or ejectment proceeding survives *Shaffer's* invasion of the in rem and quasi in rem wings of the power theory and therefore will not engender much critical analysis.[31] Rather, future judicial debate will necessarily focus on jurisdictional disputes in which unrelated real property is arguably subject to attachment.

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ing jurisdiction under the *International Shoe* test defies logic when the property is related to plaintiff's claim only because the claim arises in or is brought in the situs forum. Apparently, the unavailability of an alternate forum is considered a relevant factor in determining whether jurisdiction satisfies minimum contacts. *See, e.g.,* Bryant v. Finnish Nat'l Airlines, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

26. *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 38(1) (1971). Ownership, use, or possession of land does not create a sufficient relationship between the individual and the state for jurisdiction over the individual for claims unrelated to the land. *Id.* at comment a. Nevertheless, these interests may constitute a traditional basis for quasi in rem jurisdiction when the land is clearly tied to conduct resulting in a lawsuit. For example, plaintiff may assert an interest in the land, as in quiet title or ejectment cases, seeking establishment of his interest *only* as against designated parties or privies. RESTATEMENT OF JUDGMENTS § 32, Comment a & § 3, Comment b (1942).

27. *But see* cases cited in note 10 *supra*.

28. According to Justice Brennan, quasi in rem jurisdiction was "no longer constitutionally viable" under the Court's principal holding. Shaffer v. Heitner, 433 U.S. 186, 220 (1977) (Brennan, J. concurring in part and dissenting in part). *See also* Silberman, *supra* note 10, at 71. "If the minimum contacts test for quasi in rem actions is equivalent to the one used for in personam jurisdiction, then the *Shaffer* Court probably eliminated quasi in rem jurisdiction as we have known it".

29. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

30. *Id.* at 208-09. The Court specified that "when claims to the property itself are the source of the underlying controversy . . . it would be unusual for the State where the property is located not to have jurisdiction." *Id.* at 207.

31. The Court noted that "[i]n such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest" *id.* at 207-8 (footnote omitted), and at least one federal district court recognizes that "even after *Shaffer,* the presence of defendants' property can provide a basis for jurisdiction." Engineering Equipment Co. v. S.S. Selene, 446 F. Supp. 706 (S.D.N.Y. 1978) (quasi in rem jurisdiction sustained where cargo damage and misdelivery arose out of attached vessel's contacts with claim).

B. The Shaffer Decision

Shaffer concerned the constitutionality of Delaware's sequestration statute.[32] Plaintiff Heitner, a nonresident of Delaware who owned one share of stock in the Greyhound Corporation, filed a shareholder's derivative suit in Delaware against the officers and directors of the Greyhound Corporation, which had both its principal place of business and its headquarters in Arizona.[33] None of the defendants were residents of Delaware, but several of them owned common stock in the Greyhound Corporation, which was incorporated in Delaware. Since a Delaware statute[34] reserved the situs of Delaware corporate stock in Delaware, rather than in the state where the certificates were located,[35] plaintiff Heitner was able to sequester the defendant's stock and compel the defendants to appear and defend the suit, even though the stock was completely unrelated to the lawsuit. The defendants appeared specially to dismiss the complaint and vacate the sequestration on the ground that the seizure violated the due process clause,[36] but the chancery court denied their motion. On appeal the Delaware Supreme Court affirmed, holding that the stock's statutory situs provided a sufficient basis for asserting quasi in rem jurisdiction over the stock[37] and that because the presence of the stock, not a prior contact by the defendants with the forum, was the basis of the jurisdiction, the minimum contacts test did not apply.[38] The United States Supreme Court clearly disagreed, however.

Justice Marshall's majority opinion focused on the *Pennoyer* power theory of jurisdiction, which had established quasi in rem jurisdiction over property unrelated to the claim, up to *International Shoe.* This review laid the groundwork for his case that the in personam reasonableness test should apply to all assertions of jurisdiction. He argued that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally im-

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32. DEL. CODE ANN. tit. 10, § 366(a) (Michie 1974). The statute permits a Delaware court to assume jurisdiction over an action by sequestering a defendant's property located in Delaware.

33. 433 U.S. at 189 & n.1.

34. DEL. CODE ANN. tit. 8, § 169 (Michie 1974).

35. Delaware is the only state that does not adopt U.C.C. § 8-317, which places the situs of stock ownership where the stock certificates are located.

36. First, they argued, their ownership of stock in a Delaware corporation did not provide a sufficient nexus with the forum state to satisfy the minimum contacts test of *International Shoe.* Second, they contended, even if the court had jurisdiction, the sequestration was unconstitutional because it was accomplished without the prior notice and hearing required by the due process clause.
Silberman, *Supra* note 10, at 38.

37. Greyhound Corp. v. Heitner, 361 A.2d 225, 227 (Del. 1976), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977).

38. *Id.* at 229.

permissible."[39] Thus, he reasoned, to justify an exercise of in rem jurisdiction, the basis of the jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of a person in a thing,"[40] *that is*, it must meet the minimum contacts standard.[41]

As noted earlier, Justice Marshall recognized that when the defendant's property is present in the state, other factors will normally supply the nexus required by *International Shoe*, especially when the property is the source of the underlying controversy.[42] Therefore, claims in these situations will not be affected by applying the minimum contacts test.[43] Nevertheless, he also noted that

> although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property *alone* would *not* support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.[44]

Thus, *Pennoyer's* power standard and the leading case supporting quasi in rem jurisdiction over property unrelated to the claim[45] were overruled to the extent that they were inconsistent with the minimum contacts standard.[46] The majority would not entertain the plaintiff's arguments that the need to secure obligations,[47] the uncertainty of the minimum contacts standard,[48] the unavailability of another forum,[49] and tradition[50] should dictate against replacing *Pennoyer's* power test with *International Shoe's* reasonableness test in this category of litigation.

Prior to *Shaffer* most commentators urged the rejection of "*Pennoyer's* premise that a proceeding 'against' property is not a proceeding against the owners of that property."[51] Therefore, it is not

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39. 433 U.S. at 209.
40. *Id.* at 207.
41. "We therefore conclude that *all* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212. Although the case has been reported to have overruled *Pennoyer*, Young, *Supreme Court Report*, 63 A.B.A.J. 1612 (1977), *Pennoyer* was overruled only to the extent that its power basis for judicial jurisdiction is inconsistent with *International Shoe's* reasonableness basis for such jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977).
42. 433 U.S. at 207-08. These other factors, which include presence of records and witnesses in the state and "the state's interests in assuring marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about possession of that property," do not necessarily supply a nexus, but rather make jurisdiction more reasonable.
43. *See* text accompanying notes 30-31 *supra*.
44. *Id.* at 209 (emphasis added). "These are the cases where the property which now serves as the basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action." *Id.* at 208-09. *See also* RESTATEMENT OF JUDGMENTS § 32, Comment a (1942).
45. Harris v. Balk, 198 U.S. 215 (1905).
46. 433 U.S. at 212 n.39.
47. *Id.* at 210.
48. *Id.* at 211.
49. *Id.* at n.37.
50. *Id.* at 211-12.
51. *Id.* at 205.

surprising that the *Shaffer* Court was dissatisfied with Delaware's purported quasi in rem jurisdiction over a nonresident defendant's corporate stock; in *Shaffer* the stock had a statutory situs in Delaware and was completely unrelated to the lawsuit.[52] The majority expressly declined to consider, however, the issue of quasi in rem jurisdiction over unrelated property when plaintiff has no other forum available where he can secure a remedy. Apparently, the majority believed that the reasonableness test could be adequately applied in most cases without causing uncertainty.

C. Shaffer's Concurring Opinions: Quo Vadis?

Justice Powell's concurring opinion expressed concern that a broad interpretation of the majority opinion would unduly inject uncertainty into jurisdictional disputes involving real property. As to this limited species of attachable property, he suggested that preservation of the traditional scheme would not interfere significantly with *International Shoe's* reasonableness standard even though presence would be the essential contact with the litigation.[53] Unfortunately, he did not specify whether the *Pennoyer* power principle survived to the extent that property was permanently located within the state or whether its indisputable presence actually satisfied the test of *International Shoe.*[54]

Justice Stevens' concurring opinion evidenced concern with ap-

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52. Nevertheless, the traditionally conservative Court decided far more than necessary to dispose of a constitutional case of indiscernible proportions and, apparently, was looking for a case to obliterate the distinction. *Shaffer's* facts deal with a relatively narrow aspect of all possible in rem and quasi in rem bases for judicial jurisdiction governed by *Pennoyer's* mere presence test after *International Shoe* and prior to *Shaffer,* that is, equitable sequestration of directors' and officers' stock as the jurisdictional contact in a shareholder's derivative action. Delaware asserted jurisdiction solely on the basis of the statutory presence of the defendants' stock in the state; nothing in the record was directed to the question of minimum contacts. Hence, although the Court was willing to glean sufficient inferences to characterize the matter as appropriate for establishing the uniform minimum contacts standard, it is arguable that the *Shaffer* Court had a deficient record for purposes of determining the constitutional question. Justice Brennan stated, "[T]he Court today is unable to draw upon a proper factual record in reaching its conclusion." Shaffer v. Heitner, 433 U.S. 186, 221 (1977) (Brennan, J., concurring and dissenting). Likewise, Justice Stevens expressed his "fear that [the majority opinion] purports to decide a great deal more than is necessary to dispose of this case . . . ." *Id.* at 219 (Stevens, J., concurring).

The Court could have held quasi in rem jurisdiction subject to the minimum contacts standard and remanded the case for consideration of whether the standard was met, or it could have applied the standard itself, "but confined its discussion to the sufficiency of the contacts provided by the presence of the property in the state, and could have concluded on that basis alone that because the cause of action was unrelated to the property the required contacts were not present." Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U.L. REV. 126, 131 (1978) (footnotes omitted).

53. *Id.* at 217.

54. Silberman, *supra* note 10, at 68. Professor Silberman points out that "if Justice Powell's problem with the Delaware statute is only with the attachment of the intangible corporate stock, his quarrel is with *Harris v. Balk* rather than *Pennoyer* itself." *Id.* (footnotes omitted).

plication of the majority opinion in other factual contexts.[55] He apparently shared Justice Powell's apprehension regarding a broad interpretation of *Shaffer* to invalidate quasi in rem jurisdiction over real property unrelated to the claim.[56] His terse analysis focused upon the defendant's assumption of the risk that a state may exercise jurisdiction over his property since "[c]ontact with the state, though minimal, gives rise to predictable risks."[57] Nevertheless, he emphasized that the type of property at issue could determine the expectations of the owners. For example, a person buying real property in a state could reasonably be expected to assume the risk that the state would exercise jurisdiction over him. One who merely purchases securities on the domestic market, however, could not be expected to assume the risk that a state court will assert jurisdiction over him on an unrelated claim simply because the stock was in a corporation incorporated in the state.[58] Thus, like Justice Powell, Justice Stevens would not invalidate a state court's assertion of quasi in rem jurisdiction when real property was involved.[59]

Finally, Justice Brennan agreed that the minimum contacts analysis was a better measure for state court assertions of jurisdiction than the *Pennoyer* standard, but dissented from the majority's application of the reasonableness test in this case.[60] He believed that the majority's evaluation of the minimum contacts question should not have been reached because both the Delaware Supreme Court and the parties made it plain that the Delaware sequestration statute operated strictly as an embodiment of quasi in rem jurisdiction.[61]

Justice Brennan also felt that the Court should not have foreclosed Delaware from asserting jurisdiction "to adjudicate a shareholder's derivative action centering on the conduct and policies of directors and officers of a corporation chartered by that State"[62] if the State did so on the basis of minimum contacts. In his view, a

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55. 433 U.S. at 219.

56. Justice Stevens expressly agreed with Justice Powell's commentary about the unnecessary reach of the majority opinion. He stated, "I agree with Mr. Justice Powell that [the majority opinion] should not be read to invalidate *in rem* jurisdiction where real estate is involved." *Id.* Justice Stevens most likely intended this statement to exhibit his belief that quasi in rem jurisdiction over unrelated real property retains post-*Shaffer* vitality.

57. *Id.* at 218.

58. *Id.* at 218-19. Professor Silberman points out, however, that Justice Stevens failed to articulate how the expectations of the parties could be identified. Silberman, *supra* note 10, at 69.

59. "I agree with Justice *Powell* that [the majority opinion] should not be read to invalidate *in rem* jurisdiction where real estate is involved." 433 U.S. at 219. Again, Professor Silberman points out that "like Justice Powell, Justice Stevens did not clarify whether *Pennoyer* survived to that extent or whether the existence of such facts would satisfy the test of *International Shoe*. Silberman, *supra* note 10, at 69 n.196.

60. 433 U.S. at 219-20 (Brennan, J., concurring in part and dissenting in part).

61. *Id.* at 219. In his view, "a purer example of an advisory opinion is not to be found." *Id.* at 220.

62. *Id.* at 222.

state's valid substantive interests were important considerations in determining whether jurisdiction over a claim was constitutional.[63] In this respect, he placed much less emphasis than did the majority on the distinction between choice of law and jurisdictional inquiries. Adopting former Justice Black's view that both inquiries "are often closely related and to a substantial degree depend upon similar considerations,"[64] he contended that "[at] the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy."[65] Under Justice Brennan's minimum contacts analysis the defendants voluntarily invoked the benefits and protections of Delaware's laws and, therefore, could be subject to the state's jurisdiction without violating the Constitution.

D. Constitutional Bar to Special Status for Real Property

The concurring opinions raised interesting questions about the full impact of the majority decision. Obviously, mere presence of property will not be directly asserted in support of jurisdiction. Mere presence may, however, make it indirectly reasonable to attach the property and thereby retain the *Pennoyer* power theory in some categories of quasi in rem actions. Hence, the arguments that unrelated real property may be both an essential contact *and* a jurisdictionally sufficient contact under current notions of fair play and substantial justice must be examined for conflict with due process.

Justices Powell's and Stevens' concurring opinions suggested that the relation to claim requirement be relaxed when for example, permanent situs[66] or fair notice[67] considerations exist. Embryonic post-*Shaffer* commentary on this question appears to be split. Writers strictly interpreting the case anticipate denial of quasi in rem ju-

63. *Id.* at 223. These interests include providing restitution for its victimized local corporations, regulating an area in which the state has a manifest interest, and providing a forum to oversee the affairs of state-created institutions. *Id.* at 224-26.

64. *Id.* at 224-25, *quoting* Hanson v. Denckla, 357 U.S. 235, 258 (1958) (Black, J., dissenting).

65. 433 U.S. at 225. "Furthermore, I believe that practical considerations argue in favor of seeking to bridge the distance between choice-of-law and jurisdictional inquiries." *Id.*

66. In the case of real property, in particular, preservation of the common law concept of *quasi in rem* jurisdiction arguably would avoid the uncertainty of the general *International Shoe* standard without significant cost to "traditional notions of fair play and substantial justice". 433 U.S. at 217 (Powell, J., concurring).

67. *See* text accompanying notes 56-59 *supra*.

> The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the state will exercise its power over my property or my person while there. My contact with the state, though minimal, gives rise to predictable risks.

Id. at 218-19 (Stevens, J., concurring).

risdiction when the seized asset is unrelated to the claim.[68] Those interpreting *Shaffer* more narrowly would condone such jurisdiction for various reasons, including choice of law interest analysis,[69] analogy to doing business in the forum,[70] a lower level reasonableness test for quasi in rem jurisdiction,[71] or the defendant's inability to collaterally attack when he has not entered a limited appearance to raise his objection to the jurisdiction.[72]

Constitutional bars may exist, however, against requiring actual minimum contacts for moveables and intangibles while permitting fictional minimum contacts for jurisdiction over unrelated real property.[73] The United States Supreme Court is both final arbiter of the

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68. In support of a logically consistent jurisdictional approach, one commentator argues as follows:

> Hence, as Justices Powell and Stevens suggest, *Shaffer* might be read to hold assertions of jurisdiction quasi in rem unconstitutional only if the defendant is not allowed to enter a limited appearance or if the assets seized are not a tangible or fixed nature and knowingly exposed by the defendant to the jurisdiction of a state. Neither of these narrow interpretations of *Shaffer,* though, is consistent with the Court's reasoning or with jurisdictional theory as shaped by *International Shoe.*

Comment, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 158 (1977) (footnote omitted). *See also* Note, *Shaffer v. Heitner: A New Attitude Toward State Court Jurisdiction,* 13 TULSA L. REV. 82, 92-93 (1977).

69. *See* Comment, *Quasi in Rem on the heels of Shaffer v. Heitner: If the International Shoe Fits . . .,* 46 FORDHAM L. REV. 459, 472 (1977).

One post-*Shaffer* commentator urges that "[a]lthough the state's interest cannot create contacts between the state and the defendant, the interest might bear on the fairness of an assertion of jurisdiction if that interest is viewed as sufficiently important." Note, *The Expanded Scope of the Sufficient Minimum Contacts Standard: Shaffer v. Heitner,* 63 IOWA L. REV. 504, 521 (1977).

70. *See* Comment, *supra* note 69, at 472.

71. Professor Silberman offers three possible ways in which a quasi in rem attachment of property unrelated to the claim can remain a valid source of state adjudicatory power.

> The first depends on whether a double standard emerges with which to test minimum contacts in quasi in rem type-II [property unrelated the claim] actions. If the minimum contacts test for quasi in rem actions is equivalent to the one used for in personam jurisdiction, then the *Shaffer* Court probably eliminated quasi in rem jurisdiction as we have known it. It is quite possible, however, that certain minimum contacts that are insufficient when standing alone in an in personam action might pass the constitutional threshold in a quasi in rem action when coupled with the attachment of the defendant's property in the state. For example, in this country the citizenship or residence of the plaintiff, without more, has never been adequate to confer jurisdiction over a nonresident defendant not present in the state. Yet perhaps the plaintiff's residence together with some other contact like the physical presence of the defendant's property in the state or a connection between the claim and the property might be enough to trigger the lower (or quasi in rem) level of a newly fashioned *International Shoe* inquiry. Certainly nothing explicit in *Shaffer* precludes these possibilities.

Silberman, *supra* note at 71-72 (footnotes omitted).

Silberman cites Omni Aircraft Sales, Inc. v. Activaclades Aereas Arazonesas, No. 77-669 (D. Ariz. Nov. 15, 1977) as a case that supports the applicability of a double standard. Silberman, *supra* at 73.

For the other two possible ways in which Professor Silberman believes a quasi in rem attachment of unrelated real property can be a valid exercise of state power, see *id.* at 74-77.

72. *See* Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?,* 26 KANSAS L. REV. 61, 79-80 (1977).

73. For example, equal protection bars improper classifications of individuals. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949), which deals with standards of review issues that now are currently emerging. Individuals may not be distinguished by judicial fiat involving quasi in rem jurisdiction in a way that

contemporary meaning of due process and the unifying force concerning matters of compulsory civil process arising in state courts.[74] In *International Shoe* the Court determined that due process "[d]oes not contemplate that a state may make a binding judgment . . . against an individual or corporate defendant with which the state has no contacts, ties or relations."[75] Later, the Court refined this framework by holding that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[76] Under this language, the minimum contacts test appears to support the theory that possession or use of property subjects the owner to litigating his interest in the state where the property is located since the state affords fire, police and other related protections and benefits. The *Shaffer* decision, however, clearly recognizes that although the presence of the property might *suggest* the existence of other ties, presence alone will not support situs jurisdiction for unrelated litigation.[77]

Thus, the shift from power to reasonableness as the due process measure of jurisdiction over property means that jurisdictional attachment of real property survives *Shaffer* only if the property has a nexus with the claim; but if actual contacts are lacking, due process cannot be met since it is inherently unreasonable to require a property owner to yield substantive due process rights by virtue of ownership. Although several arguments can be made for retaining quasi in rem jurisdiction over real property unrelated to the claim, none of those arguments meet *International Shoe's* due process requirements.

III. Arguments for Retaining Quasi In Rem Jurisdiction Over Real Property Unrelated to the Claim

A. Unavailability of Another Forum

The *Shaffer* Court specifically reserved the issue whether the unavailability of other forums for the plaintiff would justify attachment of the defendant's property in a quasi in rem action.[78] If a fo-

results in exposure to attachment of unrelated real property but nonexposure of unrelated moveables or intangibles.

74. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

75. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

76. Hanson v. Denkla, 357 U.S. 235, 253 (1958).

77. Shaffer v. Heitner, 433 U.S. 186, 208-09 (1977). Apparently, the Court wanted to limit the breadth of this rationale for its decision. "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. at 211 n.37.

78. *Id.*

rum has no long-arm statute,[79] its long-arm statute is inapplicable,[80] or the defendant cannot be located,[81] a necessity argument would certainly be appropriate. Absent a long-arm statute, it may be economically or strategically impossible for a certain class of plaintiffs to pursue a claim. Moreover, the size of the claim may not justify litigating it in a distant forum. In addition, witnesses and evidence may be more conveniently located in a forum in which the defendant owns attachable property rather than in defendant's forum.[82] Given these practicalities, concern for the plaintiff's inconvenience is reasonable. Indeed, the *Shaffer* Court may not have intended to expand defendant property owners' due process rights at the cost of depriving plaintiffs of their traditional quasi in rem remedies when in personam jurisdiction is unobtainable.[83]

Nevertheless, that all plaintiffs need forums and some do not have them is insufficient reason to conclude that the unavailability of a forum is a basis of jurisdiction. The clearly established trend has been to sanction expansion of jurisdiction over nonresidents only in conjunction with the correlative expansion of their due process rights. *Shaffer* obliterated Justice Holmes' oft-quoted statement that jurisdiction is founded upon physical power of the forum over persons and things within it[84] by replacing power with reasonableness as *the* yardstick for jurisdiction in the quasi in rem branch of jurisdiction. Due process requires that attached property be related to plaintiff's claim,[85] and this demand is clearly all encompassing. Although allowing jurisdiction over a defendant's unrelated real property to bring the defendant before the court may be reasonable, fair, and just from the plaintiff's point of view, it ignores the defendant's due process interests and violates the Constitution just as much as would a direct assertion of jurisdiction over the defendant.[86]

There is an additional reason why the problem with plaintiff's alleged procedural impotence should not be shifted to the nonresident defendant who happens to own unrelated local property. Ab-

79. *See generally* Reasor-Hill Corp. v. Harrison, *220* Ark.*521, 249*S.W.*2d 994* (1952) (action involving real property characterized as transitory absent forum long-arm statute).

80. *See generally* American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp., 439 F.2d 428 (2d Cir. 1971) (specifically enumerated state long-arm provisions precluded federal diversity court from finding jurisdiction over corporate employer although jurisdiction existed over its employees).

81. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (quasi in rem jurisdiction over local trust property via forum publication, absent identity and location of defendants).

82. This consideration, however, assumes some contacts between the defendant, the litigation and the forum.

83. This issue was implicitly reserved by the *Shaffer* Court. *See* note 77 *supra.*

84. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

85. Shaffer v. Heitner, 433 U.S. 186, 209 (1977). *See also* text accompanying notes 40-46 *supra.*

86. Shaffer v. Heitner, 433 U.S. 186, 209 (1977).

sence of a long-arm statute or an applicable extraterritorial service scheme may evidence the determination of the forum state that the defendant should not be subject to such process.[87] This view would be explainable, not as a comparative favoring of defendants by the forum state, but as an apparent recognition that contemporary social and economic mobility renders distant filing of claims more feasible.

When an applicable long-arm statute exists, but defendant's whereabouts are unknown, one could argue that attachment of the defendant's unrelated real property is a needed quasi in rem remedy against the absentee defendant. Superficially, this argument is reasonable since a defendant should not be able to escape his obligations.[88] Equitable considerations would especially dictate that jurisdiction attach when a potential defendant engages in fraudulent conduct to avoid creditors.[89] A rule of *law* favoring jurisdiction by necessity, however, cannot survive the due process impediment imposed by *Shaffer.*[90] Unavailability of another forum is not equal to the existence of jurisdictional ties inherent in fair play and substantial justice.[91] There must be a more substantial nexus between the

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87. The converse, however, is not true. An explicit state long-arm statute expressing interest in asserting jurisdiction, although evidencing the state's determination to subject the defendant to process, should not shift the plaintiff's procedural impotence to the defendant. *But cf.* Note, *Measuring the Long Arm After Shaffer v. Heitner,* 53 N.Y.U. L. REV. 126, 136 (1978) ("The novelty of the *Shaffer* Court's approach was the suggestion that although the defendants' contacts with Delaware were constitutionally insufficient, the existence of a statute would remedy the due process deficiency.")

88. It was generally recognized prior to *Shaffer* that

> [i]t is customary for states to provide by statute that tangible things within their territory may be sold and the proceeds applied to the payment of the owner's obligations. Such jurisdiction is commonly exercised through a proceeding begun by attachment or by a bill in equity [sequestration].
>
> . . . .
>
> A state has judicial jurisdiction to entertain a suit if it has jurisdiction either over the defendant's person or over a thing in which he has an interest. When personal jurisdiction over the defendant is lacking, the judgment must be limited to the defendant's interests in the thing.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66, Comments a & c (1971).

89. For a discussion of problems with this remedy for fraud, see Comment, *Developments in the Law of State-Court Jurisdiction,* 73 HARV. L. REV. 909, 955 (1960).

90. The *Shaffer* majority opinion specifically found that "[T]he presence of property alone would not support the State's jurisdiction." Shaffer v. Heitner, 433 U.S. 186, 209 (1977). The Court did not limit its holding to moveables or intangibles, but was addressing itself to all property forms including real property.

91. Nevertheless, Justice Marshall explicitly excepted the question from the Court's holding, *see* note 77 *supra,* and at least one commentator suggests that when no alternative forum is available, quasi in rem action in which the property is unrelated to the claim could remain a proper source of state court jurisdiction.

> The unavailability of an alternate forum has always been considered a relevant, albeit not dispositive, factor in determining whether jurisdiction based on doing business in the forum state satisfied the *International Shoe* test. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952); Bryant v. Finnish Nat'l Airlines, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 440-41, 260 N.Y.S.2d 625, 628-29 (1965).

Silberman, *supra* note 10, at 76, n.238.

defendant's conduct and his absentee ownership of real property than merely its amenability to being attached.

The uniform touchstone of jurisdiction is reasonableness. Permitting attachment on fortuitous grounds is inconsistent with the requirement that the subject property be genuinely connected with the dispute. Absent fraud, unavailability of another forum does not generate from defendant's conduct, but rather from inadequate forum rules. Thus, endowing real property, as opposed to moveable and intangible property, with a special jurisdictional status because of its undisputed situs would generate the very disparity that *Shaffer* intended to repeal.

B. Assumption of Risk Through Purposeful Contact Invoking Forum Benefits

An assumption of risk argument for retaining quasi in rem jurisdiction over real property unrelated to the claim naturally begins with *Hanson v. Denkla.*[92] The *Hanson* Court emphasized the need for a reasonable nexus between defendant and the forum and clearly indicated that a defendant's purposeful availment of forum benefits and protection is sufficient to support jurisdiction.[93] Hence, it may be asserted that forum ownership of real property gives rise to the predictable risk that the quid pro quo for forum protection is amenability to attachment.[94]

The strength of the bond between unrelated real property and the forum would be determined by a mecnahical application of *Hanson's* purposeful availment test. In *Hanson* the Court disavowed jurisdiction when plaintiff's conduct required defendant to deal with the forum resident as to trust property that was the subject of the litigation. Mere ownership of forum property, however, constitutes a far more tenuous basis for demonstrating the requisite jurisdictional ties[95] than the prolonged, substantial but insufficient forum conduct

92. 357 U.S. 235 (1958) (Florida is without in personam jurisdiction over Delaware trustee administering Pennsylvania trust created by Florida testatrix, previously domiciled in Pennsylvania, since the trustee did not *purposefully* avail itself of benefits and protection of Florida law).

93. *Id.* at 253.

94. *See* test accompanying note 57, *supra.*

In Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977), the court, relying on Justice Stevens expectation notion, upheld an assertion of quasi in rem jurisdiction based on the attachment of a foreign defendant's New York bank account and rejected the defendant's contention that mere presence of the account was an insufficient contact.

95. As confirmed by a post-*Shaffer* federal opinion, "When the claim sued upon is unrelated to the defendant's forum activities, he may have 'no reason to expect to be haled before [the forum state's] court[s].' " Toro Co. v. Ballas Liquidating Co., 572 F.2d 1267, 1271 (8th Cir. 1978) (rejecting long-arm jurisdiction for lack of contacts), *quoting* Shaffer v. Heitner, 433 U.S. 186, – (1977), *but cf.* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (court upheld assertion of quasi in rem jurisdiction based on attachment of Turkish defendant's New York bank account in wrongful death action growing out of airplane crash in Turkey).

of the defendant in *Hanson.*[96] Although the taxpaying property owner expects to earn the usual incidents of municipal protection flowing from the state, these paid-for expectations should not result in waiving the reasonableness limitation imposed upon quasi in rem attachment by the Due Process Clause.[97] Otherwise, mere presence of property, which *was* the basis for judicial jurisdiction under *Pennoyer,* would survive notwithstanding *Shaffer's* express letter[98] and spirit.[99] Such an indirect assertion of personal jurisdiction is no longer permissible on the basis of ownership of real property in the forum.

C. Application of a Choice of Law Interest Approach to Jurisdiction

The Court's summary reference to presence of unrelated property suggesting the existence of other ties among the defendant, state and litigation[100] has engendered the position that a functional choice of law approach may appropriately authorize jurisdictional attachment.[101] If conflict of laws principles are utilized to fill this judicial gap, the interests of the plaintiff and forum could quantitatively outweigh the interests of the defendant.

Ownership of property permanently located in the forum would expose the owner's interests to attachment since permanent situs necessarily involves property in forum social, economic and legal mat-

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96. The nonresident trustee engaged in multiple transactions with the forum trustor for eight years prior to generation of the dispute.

97. *See* note 90 *supra.*

98. The Court expressly disavowed quasi in rem jurisdiction completely unrelated to plaintiff's claim since presence of property alone cannot comply with fair play and substantial justice. *Id.* at 208-09.

99. The Court noted that " this type of case also presents the clearest illustration of the argument in favor of assessing assertions of jurisdiction by a single standard." *Id.* at 209.

As noted earlier, the Court left undecided whether mere presence of property will suffice when no other forum is available. Besides the question of when a court will consider a plaintiff to have no other available forum, it is unclear whether the exercise of jurisdiction in this situation would be an exception to *Shaffer* and, therefore, a limited retention of the power theory of jurisdiction, or whether it is an application of the minimum contacts test. Professor Silberman points out that resolution of this question can have practical consequences. For example, if the power theory is rejected completely as contrary to due process, and all assertions of jurisdiction must be justified on a fairness rationale, then

> the traditional basis of physical "tag" for serving a defendant within a state—a basis grounded on notions of territorial sovereignty and one that permits the exercise of jurisdiction no matter how transient the defendant's presence in the state or how unrelated the cause of action—would be constitutionally suspect. If, on the other hand, [an assertion of jurisdiction over property unrelated to the suit when no other forum is available] is explained as an exception to *Shaffer's* holding and justified by the traditional power over tangible property, the transient presence rule might survive in the in personam area.

Silberman, *supra* note 10 at 75-76 (footnotes omitted).

100. Shaffer v. Heitner, 433 U.S. 186, 209 (1977).

101. *See, e.g.,* Comment, supra note 69, at 472; Silberman, *supra* note 10 at 79-90.

ters.[102] Nevertheless, the necessary tie between the real property owner and the forum would actually accrue by virtue of plaintiff's need for a forum.[103] This result, though ostensibly based upon considerations of fairness, really considers *only* the plaintiff's interests and impermissibly emasculates the defendant's due process interest. A defendant should now justifiably expect that mere ownership of forum property, without more, no longer supports quasi in rem jurisdiction; although ownership might *suggest* other contacts, neither the governmental interest approach[104] nor the most significant contacts approach[105] to conflict of laws should be used to jurisdictionally confirm this "suggestion."

When the property is related to the plaintiff's claim, contacts that are considered adequate for choice of law would also support jurisdiction,[106] but would be insufficient to support jurisdiction in the case of *unrelated* real property.[107] The Supreme Court has twice rejected the argument that proper application of a particular state's

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102. Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff,* 43 BROOKLYN L. REV. 600, 617 (1977).

103. *See generally* Comment, *supra* note 69, at 477.

104. As defined by one of the leading cases,

> [T]he "comparative impairment" approach to the resolution of such conflict seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.

Bernard v. Harrah's Club, 16 Cal. 3d 313, 320, 128 Cal. Rptr. 215, 221 (1976). *See generally* Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963); Horowitz, *The Law of Choice in California - A Restatement,* 21 UCLA L. REV. 719, 748 (1974). Assessing the various interests of the states whose laws are in conflict has become the dominant mode of analyzing choice of law problems. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 63-64 (1965); vonMehren, *Recent Trends in Choice of Law Methodology,* 60 CORNELL LAW REVIEW 927, 928-41 (1975).

105. As defined by one of the leading cases, "Justice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." Babcock v. Jackson, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 750 (1963) (citations omitted). For a symposium article regarding the most significant contacts approach to choice of law, see *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COL. L. REV. 1212 (1963).

106. As stated by the *Shaffer* Court,

> The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe.*
>
> This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to property itself are the source of the underlying controversy between the plaintiff and the defendant . . . .

Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

107. *But cf.* Comment, *supra* note 69, at 472 (when the doing business test and interest balancing approach are combined, the defendant's otherwise unrelated property provides requisite jurisdictional ties); Comment, *The Reasonableness Standard in State-Court Jurisdiction: Shaffer v. Heitner and the Uniform Minimum Contacts Theory,* 14 WAKE FOREST L. REV. 51, 77 n.131 (1978) (seizure necessary to secure important governmental interest); Note, *The Expanded Scope of the Sufficient Minimum Contacts Standard: Shaffer v. Heitner,* 63 IOWA L. REV. 504, 520-21 (1977) (state's interest may bear upon fairness of assertion of jurisdiction).

law will *necessarily* result in jurisdiction over persons and things,[108] and *Shaffer* apparently reasserted the implications of *Hanson* that more contacts are needed for jurisdiction than for choice of law.[109]

In this writer's opinion, applicability of the choice of law interest analysis is, using its own balancing process, more unreasonable than not. Unrelated real property, however permanently situated in the forum, does not demonstrate the type of forum activity that should result in the *jurisdictional* ties required by *Shaffer.*[110] Although its owner has social and economic ties with the forum, utilization of these contacts for both choice of law *and* jurisdictional purposes would realistically base jurisdiction upon mere presence of land. This result would certainly be incongruous in the so-called reasonableness era spawned by *Shaffer.* The defendant does not, by reason of owning the property, impliedly consent to its exposure to quasi in rem attachment on claims unrelated to the land attached. If ownership of property were deemed to be within *Hanson's* purposeful availment test, jurisdiction would be grounded in fortuitousness rather than fairness.

The continued vitality of quasi in rem jurisdiction over unrelated real property, but not moveables or intangibles, would be a "perpetuation of ancient forms that are no longer justified . . . [and] that are inconsistent with the basic values of our constitutional heri-

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108. In *Shaffer* the Court affirmed that it had

> rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.
>
> [The State] does not acquire . . . jurisdiction by being the center of gravity of the controversy, or the most convenient location for the litigation. The issue is personal jurisdiction, not choice of law.

Shaffer v. Heitner, 433 U.S. 186, 215 (1977), *quoting* Hanson v. Denkla, 357 U.S. 235, 254 (1958). *See also* Kulko v. Superior Court, 46 U.S.L.W. 4421, 4425 (U.S. May 15, 1978) (California law may apply in New York action for child support, but California courts lack jurisdiction to hear case).

109. Professor Silberman likewise recognizes this point. Silberman Supra note 10, at 82. Justice Brennan criticized the majority for rejecting the state's interest in providing a forum as bearing upon due process fairness. He reasoned as follows:

> I believe that practical considerations argue in favor of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries . . . . [W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.

Shaffer v. Heitner, 433 U.S. 186, 225-26 (1977) (Brennan, J., concurring and dissenting).

110. *See, e.g.,* note 106 *supra. Contra,* Silberman, *supra* note 10, at 82. Professor Silberman believes that "The impact of a conflict of laws decision more seriously affects the rights of the parties than a decision on jurisdiction, which merely directs the parties to an appropriate forum in which to litigate their case." *Id.* at 82-83. Thus, except possibly for the situation in which the state applies its own laws solely to compensate resident plaintiffs, she asserts that "if a court *has the power to apply its own law,* it should have the power to exercise jurisdiction over the action." *Id.* at 88. Professor Silberman bases her position on what she perceives to be a correlation between choice of law and the forum in which to apply the law. *Id.* at 89.

tage."[111] Acquiescence in this distinction would cause too great a cost to judicial notions of fair play and would, therefore, derogate from the quest for uniformity of result. Short of ressurrecting the physical power test of jurisdiction, it is too difficult to rationalize a basis for placing real property in this special jurisdictional category.

D. Avoiding the Uncertainty of the Minimum Contacts Inquiry as to Forum Land

By substituting a reasonableness test for the previous mere presence test of jurisdiction, *Shaffer* introduces an element of uncertainty since presence of property does not automatically confer jurisdiction, as was previously possible under *Pennoyer.* Indeed, Justices Powell's[112] and Stevens'[113] concurring opinions could fairly be read to imply that the power approach might be preserved for real property, absent a viable method of obtaining in personam jurisdiction over the owner.[114] Arguably, this would serve to avoid uncertainty without substantial cost to *Shaffer's* relation to claim requirement.[115] Merely determining whether the land is present, rather than utilization of the minimum contacts test, avoids a more sophisticated judicial inquiry that could fluctuate with the composition of the Court and vacillating notions of fair play and substantial justice.[116]

The latent constitutional flaw in this position, however, can be drawn from judicial concern with adverse implications of the power theory of jurisdiction. Although land ownership may logically suggest additional ties,[117] the uncertainties of applying the new contacts test in no way confirm this suggestion. Nevertheless, this uncertainty should not avoid the recognized need for finding contacts surmounting the due process barrier. Presence alone does no more than bootstrap attachment beyond the minimum contact sought by the *Shaffer* Court.

If the power principle of jurisdiction is clandestinely retained for quasi in rem jurisdiction to secure, indirectly, personal jurisdiction over an absentee defendant, the desire for an integrated theory of judicial jurisdiction with a single standard for ensuring fair play would be thwarted. Moreover, the ambiguity injected into *Shaffer's* relation to claim mandate, which would arguably permit real prop-

111. Shaffer v. Heitner, 433 U.S. 186, 212 (1977).
112. Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Powell, J. concurring).
113. *Id.* at 219 (Stevens, J., concurring).
114. *But see* text accompanying note 54 *supra*, and note 59 *supra*.
115. *See* text accompanying note 53 *supra.*
116. *See* note 3 *supra.*
117. As stated by the Supreme Court, "The Due Process Clause 'does not contemplate that a state may make a binding judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.' " Shaffer v. Heitner, 433 U.S. 186, 216 (1977), *quoting* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

erty attachment without regard to its role in the litigation,[118] would institutionalize uncertainty. The laudable judicial interest in simplicity and resolving the merits cannot continue to blur the expanded due process rights of the defendant, which include exposure to suit by way of property seizure only upon a related claim.

IV. Conclusion

Shaffer stormed the power-based citadel of jurisdiction, with the result that mere presence of property no longer supports jurisdictional attachment.[119] The premise for its single standard triumph over previous lack of uniformity is that "[i]f a direct assertion of personal jurisdiction over the defendant would violate the Constitution . . . an indirect assertion of that jurisdiction should be equally impermissible."[120]

The majority's reservation of issues, which could effectively retain the power principle over a person in the absence of personal jurisdiction, raises doubt as to the purported interment of unconstitutional means of bringing a defendant before a court. The concurring opinions crystallized this doubt regarding unrelated real property.

If the power principle is retained under the guise of fairness to the parties or to forum interests, traditional notions of fair play will be offended more readily than ever before. Perpetuation of the traditional quasi in rem remedy, in view of modern commitment to uniformity, will be inconsistent with the quest for reasonable rather than power-based contacts. Contemporary mobility and investigative techniques do not justify jurisdictional attachment of unrelated real property, which is no more than a direct assertion of in personam jurisdiction.

The recently announced minimum contacts test for all assertions of judicial jurisdiction is neither transparent nor unalterable. It is the skin of a living thought, varying in color and content according to the times and circumstances.[121] The pervasive rationale of *Shaffer*

118. *Compare* Shaffer v. Heitner, 433 U.S. 186, 208-09 (1977) (majority opinion) *with id.*, at (Powell, J., concurring).

119. This statement does not purport to extend to the judicial law established under admiralty proceedings.

120. Shaffer v. Heitner, 433 U.S. 186, 209 (1977).

121. This language was used by Justice Holmes to indicate his pervasive approach to construing the Constitution. "A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and times in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

necessitates avoidance of ancient forms without contemporary justification. If fictional minimum contacts are retained from pre-*Shaffer* power analysis, the relation to claim concept will be strangled in its infancy by latent judicial reactionism.